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No. 92-896

In the Supreme Court of the United States

OCTOBER TERM, 1992

THUNDER BASIN COAL COMPANY, PETITIONER

v.

ROBERT B. REICH, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the district court lacked jurisdiction to enjoin enforcement of a regulation promulgated pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 *et seq.*, because that Act provides a comprehensive scheme of administrative and judicial review, and vests exclusive jurisdiction over judicial review actions in the courts of appeals.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	23

TABLE OF AUTHORITIES

Cases:

Abbott Laboratories v. *Gardner*, 387 U.S. 136 (1967)	10, 15, 16, 17
American Coal Co. v. *United States Dep't of Labor*, 639 F.2d 659 (10th Cir. 1981)	4, 6, 11
Bender v. *Williamsport Area School District*, 475 U.S. 534 (1986)	8-9
Bituminous Coal Operators' Ass'n v. *Marshall*, 82 F.R.D. 350 (D.D.C. 1979)	11
Bituminous Coal Operators' Association v. *Secretary of Interior*, 547 F.2d 240 (4th Cir. 1977)	18
Block v. *Community Nutrition Institute*, 467 U.S. 340 (1984)	10, 11, 12
Brock v. *Roadway Express, Inc.* , 481 U.S. 252 (1987)	20
Califano v. *Sanders*, 430 U.S. 995 (1977)	9
City of Rochester v. *Bond*, 603 F.2d 927 (D.C. Cir. 1979)	13
City of Tacoma v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958)	9
Connors v. *Amax Coal Co.*, 858 F.2d 1226 (7th Cir. 1988)	13, 14
Council of S. Mountains, Inc. v. *Donovan*, 516 F. Supp. 955 (D.D.C. 1981)	11
FTC v. *Standard Oil of California*, 449 U.S. 232 (1980)	10, 15
Gardner v. *Toilet Goods Association*, 387 U.S. 167 (1967)	15, 17

Cases—Continued:

	Page
Leedom v. *Kyne*, 358 U.S. 184 (1958)	16
Lujan v. *National Wildlife Federation*, 497 U.S. 871 (1990)	10, 21
Mathews v. *Eldridge*, 424 U.S. 319 (1976)	15, 21-22
Owen Equip. & Erection Co. v. *Kroger*, 437 U.S. 365 (1978)	9
Pacific Power & Light Co. v. *Bonneville Power Admin.*, 795 F.2d 810 (9th Cir. 1986)	11
Secretary of Labor, Mine Safety & Health Admin v. *Jim Walter Resources, Inc.*, 7 F.M.S.H.R.C. 1348 (1985), aff'd *sub nom. Brock* v. *Peabody Coal Co.*, 822 F.2d 1134 (D.C. Cir. 1987)	14
Southern Ohio Coal Co. v. *Donovan*, 774 F.2d 693 (1985), amended, 781 F.2d 57 (6th Cir. 1986)	5, 15, 18, 19, 20, 21, 22
Thunder Basin Coal Co. v. *Martin*, No. 91-CV-0050-B (D. Wyo. Mar. 13, 1992)	5
United Mine Workers of America v. *Peabody Coal Co.*, 7 F.M.S.H.R.C. 1357 (1985)	14
United States Steel Corp. v. *Marshall*, 471 F. Supp. 438 (W.D. Pa. 1979)	11
United States v. *Fausto*, 484 U.S. 439 (1988)	12
Utah Power & Light Co. v. *Secretary of Labor*, 897 F.2d 447 (10th Cir. 1990)	2, 13, 18
Weinberger v. *Salfi*, 422 U.S. 760 (1975)	12
Whitney Bank v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965)	9, 11
Ziegler Coal Co. v. *Marshall*, 502 F. Supp. 1326 (S.D. Ill. 1980)	11
Statutes and regulations:	
Administrative Procedure Act, 5 U.S.C. 701 *et seq.*:	
5 U.S.C. 702 (§ 10(a))	9
5 U.S.C. 703 (§ 10(b))	9
5 U.S.C. 704 (§ 10(c))	10
Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742	18

Statutes and regulations—Continued:

	Page
Federal Food, Drug, and Cosmetic Act of 1938, 21 U.S.C. 301 *et seq.*	16
Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 *et seq.*	2
30 U.S.C. 801(g)(1)	2
30 U.S.C. 813(a)	2
30 U.S.C. 813(f)	2, 4
30 U.S.C. 814(a)	3
30 U.S.C. 815(a)	3
30 U.S.C. 815(d)	3, 8
30 U.S.C. 816(a)(1)	3, 10
30 U.S.C. 817(e)	3
30 U.S.C. 818	11
30 U.S.C. 818(i)	14
30 U.S.C. 820	11
30 U.S.C. 823(d)(1)	3
30 U.S.C. 823(d)(2)(A)(i)	3
Labor Managment Relations Act of 1947, 29 U.S.C. 141 *et seq.*	4
28 U.S.C. 1331	9
29 C.F.R. 2700.52	8
30 C.F.R.:	
Pt. 40	4
Section 40.1(b)(1)	2, 10
Section 40.4	4
Miscellaneous:	
S. Rep. No. 181, 95th Cong., 1st Sess. (1977)	7, 12

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 969 F.2d 970. The district court's orders (Pet. App. 19-30) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1992. A petition for rehearing was denied on August 28, 1992. Pet. App. 17-18. The petition for a writ of certiorari was filed on November 24, 1992. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Mine Safety and Health Act of 1977 (Mine Act or Act), 30 U.S.C. 801 *et seq.*, was enacted to establish "mandatory health or safety standards to protect the health and safety of the Nation's coal [and] other miners." 30 U.S.C. 801(g)(1). As part of the Act's enforcement scheme, the Secretary of Labor or his representatives are authorized to conduct "frequent" safety inspections of mines. 30 U.S.C. 813(a). The Act also provides miners with so-called "walkaround" rights, which give a "representative authorized" by the miners the opportunity to participate in any such inspections. 30 U.S.C. 813(f). The Secretary has issued a regulation that defines a "representative of miners" as "[a]ny person or organization which represents two or more miners at a coal or other mine for the purposes of the Act," 30 C.F.R. 40.1(b)(1), and the Tenth Circuit has held that a miner representative need not be an employee of the mine being inspected. *Utah Power & Light Co.* v. *Secretary of Labor*, 897 F.2d 447, 450 (1990) (per curiam). The Act generally limits the function of representatives to "aiding" safety inspections and "participat[ing] in pre- or post-inspection conferences held at the mine." 30 U.S.C. 813(f).[1] The Act does not

[1] The court of appeals described (Pet. App. 3) the functions of representatives as follows:

> A miner representative has the right to accompany the MSHA inspector on such inspections and the right to obtain an immediate inspection of the mine by MSHA if the representative has "reasonable grounds to believe that a violation of [the Mine Act] or a mandatory health or safety standard exists, or an imminent danger exists." [30 U.S.C.] § 813(g)(1). The miner representative also enjoys other rights under the Mine Act. *See id.* § 819(b) (representative receives "copy of any order, citation, notice, or decision required by [the Mine Act]"); *id.* §§815(d), 817(e) (may contest issuance, modification, or termination of an order); *id.* § 813(f) (representative may participate in pre- or post-inspection conferences).

authorize other activity by representatives while they are at the mines.

If the Secretary determines that a violation of the statute or regulations promulgated under it has occurred, the Act authorizes him to issue a citation to the mine operator, 30 U.S.C. 814(a), and to propose the assessment of civil penalties, 30 U.S.C. 815(a). A mine operator may contest a citation and proposed penalty in a hearing before an administrative law judge (ALJ). 30 U.S.C. 815(a), 815(d), 823(d)(1). If a mine operator is dissatisfied with the ALJ's decision, it may seek discretionary review before the Federal Mine Safety and Health Review Commission (Commission). 30 U.S.C. 823(d)(2)(A)(i).

The Act provides a right of judicial review once the Commission has reached a decision. A mine operator "adversely affected or aggrieved by an order of the Commission * * * may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or in the United States Court of Appeals for the District of Columbia Circuit." 30 U.S.C. 816(a)(1). Once an aggrieved party files for judicial review, the Act provides that "exclusive jurisdiction of the proceeding" rests in the court of appeals. *Ibid.*

2. Petitioner operates a coal mine near Wright, Wyoming. Pet. App. 25. In October 1990, some of its miners designated two employees of the United Mine Workers of America (UMWA), who do not work at petitioner's mine, as their "representatives" who are to observe safety inspections at the mine. See 30 U.S.C. 813(f); 30 C.F.R. Pt. 40. In 1987, the UMWA had sought unsuccessfully to become the collective bargaining representative of the miners under the Labor-Management Relations Act (LMRA), 29 U.S.C. 141 *et seq.* See Pet. 3; Pet. App. 4. After refusing to post notice of the miners' designation of UMWA personnel as their inspection representatives as required by regulation, see 30 C.F.R. 40.4, petitioner filed the present action in district court seeking to enjoin the Secretary from enforcing the inspection regulations, 30 C.F.R. Pt. 40, at its mine. Petitioner alleged that enforcement would violate its right under the LMRA to deny the union access to its property and records, and would violate due process. Pet. App. 22, 25. Petitioner filed the action in anticipation of a citation or proposed penalty for failure to comply with the regulations, but in fact no such citation or proposed penalty has ever issued. *Id.* at 7, 10.

3. The district court granted a preliminary injunction, enjoining the Secretary from enforcing the mine inspection regulations in a manner that would permit UMWA personnel to enter petitioner's property. Pet. App. 24-30. Subsequently, the court denied respondents' motion to dismiss for lack of subject matter jurisdiction and failure to exhaust administrative remedies. *Id.* at 19-23. Acknowledging that the Tenth Circuit's decision in *American Coal Co.* v. *United States Dep't of Labor*, 639 F.2d 659 (1981), held that

district courts lack jurisdiction to resolve disputes under the Mine Act, the court nonetheless concluded that the circumstances of this case justified an exception to that rule. Because petitioner raised a constitutional claim and a claim that the Mine Act conflicts with another federal statute, the district court concluded that it had jurisdiction. Pet. App. 21. The court relied on *Southern Ohio Coal Co.* v. *Donovan*, 774 F.2d 693 (1985), amended, 781 F.2d 57 (6th Cir. 1986), which it characterized as holding that "the administrative review process created by the Mine Act was inadequate to adjudicate constitutional challenges" like petitioner's. Pet. App. 21. Finally, the district court concluded that petitioner was not required to exhaust its administrative remedies before raising a constitutional challenge to agency action. *Id.* at 22.

After trial, the court concluded, without addressing petitioner's due process claim, that it was unreasonable and would conflict with the LMRA for the Secretary to permit miners to designate union personnel as representatives under the Mine Act. See *Thunder Basin Coal Co.* v. *Martin*, No. 91-CV-0050-B (D. Wyo. Mar. 13, 1992). The court accordingly entered a permanent injunction barring the Secretary from enforcing his regulations in a manner that would require petitioner to permit union personnel to gain access to its mine.

4. The court of appeals vacated the injunction and remanded with instructions to dismiss the case for lack of subject matter jurisdiction.[2] Pet. App. 1-16.

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[2] After the district court ruled in petitioner's favor on the merits, the Secretary filed an appeal. *Martin* v. *Thunder*

After tracing the Mine Act's "extensive review process for challenges to actions taken under the Act," *id.* at 5, the court of appeals concluded that "Congress' clear intent, as evidenced by both the plain language of the Mine Act as a whole and the Act's legislative history," compelled the conclusion that the statutory review process is exclusive. *Id.* at 7-8, citing *American Coal*, 639 F.2d at 660. It therefore reaffirmed its prior holding in *American Coal*, 639 F.2d at 660-662, that challenges to agency action under the Mine Act must be pursued via the administrative review process because the Mine Act grants subject matter jurisdiction to the district courts "in only the limited circumstances enumerated in 30 U.S.C. §§ 818, 820." Pet. App. 7. Thus, the district court lacked jurisdiction to consider petitioner's complaint.

The court also rejected petitioner's contention that the statutory review process was inadequate. The court reasoned that the Mine Act "does not limit the bases upon which a party may challenge a citation, order or proposed assessment," and does not "distinguish between challenges to orders based on constitutional grounds or conflict with other statutes and challenges based on misapplication of the Act itself." Pet. App. 8. In fact, the Commission routinely considers constitutional issues. *Id.* at 8-9. While acknowledging that the Commission may not "enjoy any special expertise" over such matters, the court found review in the court of appeals "adequate to address both constitutional challenges and questions of conflict with other statutes." *Id.* at 9.

Basin Coal Co., No. 92-8030 (10th Cir.). On July 20, 1992, the court of appeals issued a show cause order why that appeal should not be dismissed for want of jurisdiction in light of its decision in this case. The court subsequently dismissed the appeal in No. 92-8030 on jurisdictional grounds, and stayed its mandate in that case pending the filing and disposition of a petition for a writ of certiorari in this case.

Although "the precedent of *American Coal* and the language of the Act" sufficed for its holding, the court of appeals nonetheless found "special support" in the Act's legislative history, which shows that Congress enacted the statute in part because predecessor laws had failed to provide swift enforcement mechanisms. Pet. App. 9-10. Among the causes of delay were provisions for de novo trials in district courts over penalty assessments, and concerns over that delay prompted Congress to express its intention that "penalty litigation [under the Act] move with no undue delay." *Id.* at 10, citing S. Rep. No. 181, 95th Cong., 1st Sess. 8 (1977). It made no difference, the court reasoned, that petitioner had not received a citation or notice of proposed penalty, since "the gravamen of [the] case is a dispute over an anticipated citation and penalty." Pet. App. 10. The court observed that "[c]hallenges * * * under the Mine Act are easily characterized" in constitutional terms, and allowing district court jurisdiction based only on the presence of an asserted constitutional challenge would "permit preemptive strikes that could seriously hamper effective enforcement of the Act." *Id.* at 11.

Finally, the court held that the statutory review procedures adequately protected petitioner's due process rights. Pet. App. 11. Because a party who disobeys a Mine Act regulation and challenges an

ensuing citation is penalized only after losing on the merits, "a full and adequate hearing is provided before any penalty actually is imposed." *Id.* at 12. Even if petitioner were exposed to substantial fines and penalties, the statute provides an "adequate opportunity to challenge their assessment at the administrative level before payment." *Id.* at 13. The court also noted that petitioner could avoid significant fines either by abating the violation while challenging the citation, or by requesting an expedited hearing if it remained in noncompliance. *Id.* at 14; see also 30 U.S.C. 815(d); 29 C.F.R. 2700.52. The court doubted that the UMWA representatives would be permitted "to act beyond the scope of their rights outlined in the Mine Act" and thereby cause irreparable harm to petitioner during the pendency of litigation. Pet. App. 14. Thus, the court concluded that "the review provided for by Congress is adequate and exclusive." *Id.* at 15.

ARGUMENT

The court of appeals correctly held that the district court lacked subject matter jurisdiction because the Mine Act provides a review scheme vesting exclusive jurisdiction over cases like the present one in the courts of appeals.

1 a. Petitioner contends (Pet. 11-12) that the Mine Act's review scheme, triggered by the issuance of a citation and culminating in appellate court review, evinces no intent to preclude district court jurisdiction over this dispute. That contention is without merit. As the court of appeals noted (Pet. App. 4-5), district courts have jurisdiction only as granted by Congress. *E.g.*, *Bender* v. *Williamsport Area School*

Dist., 475 U.S. 534, 541 (1986); *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365, 374 (1978). Although 28 U.S.C. 1331 grants the district courts general federal question jurisdiction, Congress remains empowered to bypass the district courts by vesting jurisdiction in administrative agencies with judicial review in the courts of appeals. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958); *Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965).[3] Congress has enacted precisely such a scheme in the Mine Act.

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[3] Although 28 U.S.C. 1331 provides general federal question jurisdiction, that statute does not create a cause of action for petitioner. Any cause of action petitioner may have, rather, is created by Section 10(a) of the Administrative Procedure Act (APA), 5 U.S.C. 702. That provision creates a cause of action for persons "suffering legal wrong because of agency action" or who are "adversely affected or aggrieved by agency action within the meaning of the relevant statute." Although the courts below did not address the point, other provisions of the APA compel the conclusion that the district court did not have jurisdiction over petitioner's claim.

Section 10(b) of the APA, 5 U.S.C. 703, sets forth the form and venue of the cause of action created in Section 10(a). Cf. *Califano* v. *Sanders*, 430 U.S. 99 (1977) (holding that the judicial review provisions of the APA do not constitute a separate grant of jurisdiction to the district courts). Section 10(b) requires that judicial review of agency action proceed pursuant to "the special statutory review proceeding relevant to the subject matter in a court specified by statute" (in this case, the relevant court of appeals after conclusion of administrative proceedings, as provided by the Mine Act), unless the statute's review procedures are inadequate. 5 U.S.C. 703. As we argue below (and as the court of appeals' persuasive analysis demonstrates, see Pet. App. 14-15), judicial review in the court of appeals is plainly adequate. Accordingly, by the plain terms

The Act provides an elaborate and comprehensive administrative review scheme, followed by a right of judicial review in the court of appeals,[4] that leaves no room for residual district court jurisdiction. See *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 349 (1984); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967). Moreover, the Act carves out limited exceptions to its otherwise mandatory administrative review scheme, specifying that the district courts have jurisdiction over actions by the Secretary seeking injunctive or other appropriate relief to gain compliance with orders of the

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of the APA itself, petitioner has no federal cause of action in district court.

Moreover, even if the Mine Act's review scheme were inadequate, the APA still would not create a cause of action for petitioner under the circumstances of this case. When the inadequacy of the statutory review process is invoked as the basis for judicial review, Section 10(c) of the APA limits the availability of judicial review to "final agency action." 5 U.S.C. 704. The Secretary has not, however, taken any final action with respect to petitioner. Petitioner's challenge is not to the facial validity of the definition of "representative" in 30 C.F.R. 40.1(b)(1), but only to an interpretation of the rule that would permit union personnel to act as representatives. The Secretary has not taken any final action against petitioner pursuant to such an interpretation, and the APA accordingly does not authorize judicial review in any event. See *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 890-894 (1990). Indeed, even the issuance of a citation would not constitute final agency action within the meaning of the APA. *FTC* v. *Standard Oil Co. of California*, 449 U.S. 232, 239-243 (1980).

[4] Once an aggrieved party invokes his right of judicial review, the statute specifically provides that the jurisdiction of the courts of appeals is "exclusive." 30 U.S.C. 816(a)(1).

Commission. 30 U.S.C. 818, 820. See also Pet. App. 7; accord *American Coal*, 639 F.2d at 661; *Pacific Power & Light Co.* v. *Bonneville Power Admin.*, 795 F.2d 810, 814 (9th Cir. 1986) (where statute differentiates between matters subject to district and appellate court jurisdiction, that scheme is exclusive). In light of the comprehensiveness of the administrative review scheme, Congress's action in specifying certain limited circumstances in which the district courts have jurisdiction over Mine Act disputes is strong evidence that Congress did not intend the district courts to have jurisdiction over other causes of action arising under the Act. See *Block* v. *Community Nutrition Institute*, 467 U.S. at 347. Thus, the court of appeals was correct in concluding that permitting pre-enforcement district court jurisdiction in the face of the Act's comprehensive post-enforcement review scheme would defeat the very "effectiveness of the statutory design." *Whitney Nat'l Bank*, 379 U.S. at 420.[5]

The court of appeals was also correct in concluding (Pet. App. 5) that the Mine Act's legislative history indicates that Congress did not intend for district courts to have jurisdiction over pre-enforcement Mine Act disputes. As the Tenth Circuit stated in *American Coal*, Congress intended "[t]he Commis-

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[5] A number of district courts have also concluded that the Mine Act's exclusive review procedures deny them jurisdiction to resolve disputes under the statute. *Council of S. Mountains, Inc.* v. *Donovan*, 516 F. Supp. 955 (D.D.C. 1981); *United States Steel Corp.* v. *Marshall*, 471 F. Supp. 438 (W.D. Pa. 1979); *Bituminous Coal Operators' Ass'n* v. *Marshall*, 82 F.R.D. 350 (D.D.C. 1979). But see *Ziegler Coal Co.* v. *Marshall*, 502 F. Supp. 1326 (S.D. Ill. 1980).

sion [to] serve[] as the ultimate administrative review body for disputed cases arising under the new mine safety act." 639 F.2d at 661, citing S. Rep. No. 181, 95th Cong., 1st Sess. 13 (1977). The Senate Report noted that the purpose of providing a comprehensive administrative review scheme, without jurisdiction over enforcement disputes in the district courts, was to avoid delays and inefficiency in enforcing the statute's health and safety measures. Pet. App. 10 & n.4; see also S. Rep. No. 181, *supra*, at 45-46. Petitioner's claim that district court jurisdiction is nonetheless appropriate is at odds with the congressional decision in 1977 to amend the statute to *divest* district courts of jurisdiction over Mine Act disputes. The statute's legislative history thus provides further evidence—"fairly discernible in the statutory scheme," *United States* v. *Fausto*, 484 U.S. 439, 452 (1988), citing *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 351 (1984)—of Congress's intent to vest exclusive jur-isdiction in the court of appeals.

b. Nothing about the nature of petitioner's claims justifies deviating from the statutory review scheme. Although petitioner has couched its claims in terms of due process and conflict with another federal statute, the merits of this case involve only the question whether the term "representative" under the Act and its implementing regulations includes employees of a union in a non-union mine.

The Commission has the expertise to decide that statutory issue, and the jurisdiction and competence to adjudicate any constitutional claims that may be raised, in the normal course of its proceedings pursuant to the Mine Act's administrative review scheme. Cf. *Weinberger* v. *Salfi*, 422 U.S. 760 (1975).

Moreover, the Commission's resolution of these legal issues is subject to judicial review in the courts of appeals. In fact, the Commission has already held, in a ruling affirmed by the Tenth Circuit, that a "representative" under the Mine Act need not be an employee of the mine. *Utah Power & Light*, 897 F.2d at 450 (statute imposes no "limitation on the employment status of the representative").[6] The Commission currently has under consideration a case raising the same issue petitioner has raised. *Kerr-McGee Coal Corp.*, FMSHRC Docket No. WEST 91-84-R (argued Nov. 19, 1992). Accordingly, there can be no doubt that the scheme established by Congress does provide petitioner with an opportunity to obtain judicial resolution of the very issues it sought to adjudicate in the district court.[7]

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[6] That case did not, however, raise the particular statutory question raised in this case—whether the term "representative" under the Act includes a union employee at a non-union mine.

[7] In addition, it would be destructive of the statutory scheme not to permit the Commission to resolve this dispute as an initial matter. The courts of appeals have recognized that "[t]he policy behind having a special review procedure in the first place * * * disfavors bifurcating jurisdiction over various substantive grounds between district court and the court of appeals," *City of Rochester* v. *Bond*, 603 F.2d 927, 936 (D.C. Cir. 1979), and that the mere presence of a claim of a conflict between federal statutes is therefore insufficient to justify forgoing the administrative process altogether. See *Connors* v. *Amax Coal Co.*, 858 F.2d 1226, 1231 (7th Cir. 1988) (Benefits Review Board has jurisdiction to resolve case involving federal common law claims and claims under Employee Retirement Income Security Act, as well as under Black Lung Benefits Act); *Bond, supra* (Federal Aviation Administration, and not district court, has jurisdiction to resolve alleged conflict

As the court of appeals noted, it is not difficult to phrase a routine challenge to administrative action in constitutional terms. In fact, this case is an example. Petitioner's due process claim apparently is that it is constitutionally entitled to litigate its claim without the risk that it will be penalized if it loses. That claim is implausible on its face.

A litigant always risks adverse consequences if it loses in litigation. The presence of some litigation risk, however, does not raise due process concerns.[8] Petitioner cites cases assertedly supporting its due process theory, but those cases are inapposite. In the

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between Federal Aviation Act and National Environmental Policy Act). As the court of appeals noted (Pet. App. 9), although the Commission may not possess expertise with respect to the LMRA, judicial review in the court of appeals ensures that any issues arising under that Act will receive independent judicial scrutiny. "The focus is not on the agency's familiarity with particular legal questions, but on its ability to produce the kind of record that will permit adequate appellate review of the questions." *Connors*, 858 F.2d at 1231. Moreover, contrary to petitioner's assertion (Pet. 13), the Commission has in the past been willing to consider whether actions arguably prohibited by the LMRA also violate the Mine Act. See, *e.g.*, *United Mine Workers of America* v. *Peabody Coal Co.*, 7 F.M.S.H.R.C. 1357, 1364-1365 (1985); *Secretary of Labor, Mine Safety & Health Admin.* v. *Jim Walter Resources, Inc.*, 7 F.M.S.H.R.C. 1348, 1354 (1985), aff'd *sub nom. Brock* v. *Peabody Coal Co.*, 822 F.2d 1134, 1146-1148 (D.C. Cir. 1987).

[8] Petitioner overstates the degree of litigation risk to which it is exposed. The Mine Act requires the Commission to take account of a party's good faith in assessing civil penalties, see 30 U.S.C. 818(i), and, as the court of appeals noted, petitioner could abate any violation pending review or seek an expedited hearing once a citation issued. See Pet. App. 14; see also note 11, *infra*.

due process cases upon which petitioner relies, see *Mathews* v. *Eldridge*, 424 U.S. 319 (1976); *Southern Ohio Coal Co.* v. *Donovan*, 774 F.2d 693 (1985), amended, 781 F.2d 57 (6th Cir. 1986) a party was subject to a pre-hearing deprivation—that is, deprivation of a property or liberty interest *before* a meaningful hearing—that caused an irreparable injury that could not be cured by a post-hearing remedy. Because a "claim to a predeprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a postdeprivation hearing," *Mathews* v. *Eldridge*, 424 U.S. at 331, petitioner must show not only a pre-hearing deprivation of a liberty or property interest, but also that the deprivation cannot be cured by a post-hearing remedy. Petitioner's claim meets neither condition. In sharp contrast to the situation in *Mathews*, petitioner is not subject to any pre-hearing deprivation of a liberty or property interest. Petitioner is not required to pay any fines or take any action prior to the conclusion of the proceedings. And even if petitioner were somehow damaged by the mere pendency of administrative proceedings, any such damage would not be irreparable. See *FTC* v. *Standard Oil Co. of California*, 449 U.S. at 244. See also note 11, *infra*; Pet. App. 14-15 & n.6. Petitioner's due process claim is therefore entirely without merit.

c. Petitioner invokes this Court's decisions in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), and *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167 (1967), in arguing (Pet. 11-12) that the hardships it will suffer if it is forced to incur an administrative citation before gaining judicial review militate in

favor of district court jurisdiction.[9] Those cases, however, provide no support for petitioner's jurisdictional argument.

In *Abbott Laboratories*, certain drug manufacturers brought an action in district court challenging the validity of a regulation promulgated under the Federal Food, Drug, and Cosmetic Act (Drug Act), 21 U.S.C. 301 *et seq.*, without first waiting for the regulation to be enforced. This Court concluded that the district court had jurisdiction over such pre-enforcement challenges to regulations under the Drug Act, finding that the language and legislative history of the statute established that Congress intended for district courts to have jurisdiction over such claims. *Abbott Laboratories*, 387 U.S. at 141-148. In so holding, the Court rejected the government's argument that because the statute explicitly provided for pre-enforcement review of certain types of regulations, it precluded the same type of review for other kinds of regulations. *Id.* at 141. Rather, after analyzing "the context of the entire legislative scheme," *ibid.*, the Court concluded that the Drug

[9] Petitioner also relies (Pet. 12) on this Court's decision in *Leedom* v. *Kyne*, 358 U.S. 184 (1958). *Leedom*, however, is not at all like this case. In *Leedom*, an action in district court was the only means "within [petitioner's] control * * * to protect and enforce" its statutory rights, and the administrative review process was therefore inadequate. 358 U.S. at 190. Here, petitioner can trigger the Mine Act's administrative review process simply by challenging a citation. Moreover, although the legality of the Secretary's regulation has been challenged in this case, there can be no plausible allegation, as was uncontested in *Leedom*, that the agency action at issue was facially *ultra vires*. 358 U.S. at 185.

Act evinced a congressional intent *not* to eliminate judicial review over the regulations at issue. *Id.* at 144.[10]

Unlike the Drug Act cases, however, where the Court found a "congressional purpose" to permit pre-enforcement review in the district court, *Abbott Laboratories*, 387 U.S. at 141-142, no such congressional purpose can be found in the Mine Act. To the contrary, as we have argued, *supra* at 8-12, the language, structure and history of the Mine Act compel the conclusion that Congress did not intend for the district courts to exercise jurisdiction over pre-enforcement disputes.[11]

[10] In *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167 (1967), the Court concluded that the district court had jurisdiction over a pre-enforcement challenge to other regulations pro-mulgated under the Drug Act. Citing *Abbott Laboratories*, the Court did not find it necessary separately to analyze the jurisdictional issue. See *Toilet Goods Ass'n*, 387 U.S. at 168.

[11] Relying on *Abbott Laboratories* and *Toilet Goods Ass'n*, petitioner points (Pet. 11-14) as a basis for district court jurisdiction to the hardships that it will suffer if it does not gain pre-enforcement review. The discussion in those cases to which petitioner refers, however, relates *not* to the question of jurisdiction, but rather to the completely separate questions of ripeness and exhaustion. See *Abbott Laboratories*, 387 U.S. at 148-156; *Toilet Goods Ass'n*, 387 U.S. at 170-174.

In any event, as the court of appeals concluded (Pet. App. 14-15 & n.6), there is no basis for petitioner's contention that it will suffer irreparable harm if it is forced to adhere to the Mine Act review process. Although penalty assessments may mount in the face of noncompliance, the Mine Act affords petitioner a "full and adequate" hearing before the violation is established and any penalty is actually imposed. Pet. App. 12. Moreover, even if petitioner complies with the Secretary's order during the review process and thus permits union

2. Petitioner claims (Pet. 6-8) that the decision in this case conflicts with the decision of the Sixth Circuit in *Southern Ohio Coal Co.* v. *Donovan*, 774 F.2d 693 (1985), amended, 781 F.2d 57 (1986), and that this Court's review is necessary to resolve that conflict.[12] In *Southern Ohio Coal*, the court upheld a district court's assumption of jurisdiction over a due

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personnel to function as representatives, there is no basis other than speculation for petitioner's claim that the presence of union personnel in that capacity will cause it injury. See *id.* at 14-16. If union personnel acting as representatives exceed their statutory role under the Mine Act, the Act's administrative scheme remains the appropriate avenue for challenging such conduct. *Id.* at 15-16, citing *Utah Power & Light*, 897 F.2d at 452. There is no reason to believe the Commission would not act appropriately in limiting the conduct of the representatives in such circumstances.

Thus, contrary to petitioner's suggestion (Pet. 10 n.8), even if there were jurisdiction in the district court, there would be no basis for excusing petitioner's failure to exhaust its administrative remedies.

[12] Petitioner also claims (Pet. 8-9) that the decision below conflicts with the Fourth Circuit's decision in *Bituminous Coal Operators' Ass'n* v. *Secretary of Interior*, 547 F.2d 240 (1977). That decision, however, predated the substantial changes in the Act's review scheme that in part provided the basis for the decision below. *Bituminous Coal* arose under the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742 (1969). As the court below emphasized (Pet. App. 10 & n.4), that statute was superseded by the Mine Act in 1977, which was enacted in part because Congress thought it necessary to narrow the availability of district court review. Since its consideration of the pre-1977 statute in *Bituminous Coal*, the Fourth Circuit has not had occasion to decide a case under the quite different judicial review scheme enacted in the Mine Act.

process challenge to a rule promulgated under the Act. Because of the particular nature of the constitutional claim in that case, the Sixth Circuit held that the Act's comprehensive administrative and judicial review scheme was not exclusive of the district court's general federal question jurisdiction. Although there is some tension between *Southern Ohio Coal* and the decision below, it is not clear that the rationale of *Southern Ohio Coal* would permit a district court in the Sixth Circuit to assume jurisdiction over a due process claim like petitioner's. And the *Southern Ohio Coal* court expressed no view whatever on petitioner's principal claim in this case —that the district court had jurisdiction to resolve a purported conflict between the Mine Act and another federal statute. We therefore do not believe that whatever tension exists between *Southern Ohio Coal* and the decision below is sufficient to require this Court's review.

At issue in *Southern Ohio Coal* was a regulation that required mine operators to reinstate, pending the outcome of the administrative review process, terminated miners who made a "non-frivolous" claim that their termination was in retaliation for reporting safety violations at a mine. The mine operators claimed that it violated due process for the Secretary not to provide "any pre-deprivation hearing whatsoever before granting temporary reinstatement" to miners terminated for exercising their rights under the statute. 774 F.2d at 698. Whatever the outcome of the administrative proceedings—*i.e.*, whether or not the termination at issue was upheld—the mine operator was injured by being forced to employ a miner who it had determined should be fired

without any hearing to determine whether the firing was justified.[13] That injury, moreover, could not be cured by a post-hearing remedy, because the mine operators' challenge had no connection to the merits of the particular dispute before the Commission. The "injury is present regardless of whether the miners' complaints ultimately are sustained or denied." 774 F.2d at 699.[14] The Sixth Circuit accordingly held that the mine operators' claim could appropriately be brought in district court because their injury was "irremediable by the statutorily-prescribed method of review." 774 F.2d at 701.[15]

The situation in the present case is far different from that in *Southern Ohio Coal*. The mere issuance

[13] The threshold determination whether the miner's claim of retaliation was "non-frivolous" was made ex parte by the Secretary without any possibility of input by the mine operator. 774 F.2d at 704.

[14] In fact, the lack of any connection between the operators' claims and the merits of the decision to terminate any particular miner saved *Southern Ohio Coal* from mootness. In that case, the mine operators and miners had settled the particular disputes that gave rise to the case, but the court held that the case was not moot, precisely because the procedures employed by the Secretary—requiring reinstatement while administrative proceedings were pending without a meaningful pre-deprivation hearing—injured the mine operators in any event. 774 F.2d 699-700.

[15] On the merits, the *Southern Ohio Coal* court concluded that the Secretary's reinstatement procedures violated due process. This Court's later decision in *Brock* v. *Roadway Express, Inc.*, 481 U.S. 252 (1987), which concluded that due process did not require a pre-deprivation hearing under a parallel reinstatement scheme in another federal statute, effectively repudiated that holding.

of a Mine Act citation stemming from petitioner's refusal to permit union personnel to act as representatives under the Mine Act would not, in itself, cause petitioner any injury (much less irreparable injury) without the opportunity for any meaningful hearing.[16] To the contrary, petitioner is not required to pay any fines or take any action prior to the conclusion of the administrative review process, and is entitled to judicial review in the court of appeals if it is aggrieved by the Commission's decision. As the court of appeals explained, the Mine Act affords petitioner "a full and adequate hearing * * * *before* any penalty actually is imposed." Pet. App. 12 (emphasis added). Thus, while the Sixth Circuit in *Southern Ohio Coal* characterized the mine operators' due process allegation as a "bona fide claim[] against the procedure adopted by the Secretary," 774 F.2d at 701, the claim in this case does not meet even the threshold requirement of a procedural due process claim under *Mathews* v. *Eldridge*—that the claim "rest[] on the proposition

[16] The fact that no citation has ever issued, and no final agency action has ever been taken against petitioner, provides an additional distinction between this case and *Southern Ohio Coal*. The challenge in *Southern Ohio Coal* was to the facial validity of a regulation that required immediate action on the part of the mine operator, and the issuance of the final rule provided the requisite final agency action required by the APA. See *Lujan* v. *National Wildlife Federation*, 497 U.S. at 891-892. As we have explained, see note 3, *supra*, in the present case there has been no final agency action and the APA accordingly does not provide a basis for petitioner's cause of action.

that full relief cannot be obtained at a postdeprivation hearing." 424 U.S. at 331.

Unlike the claims in *Southern Ohio Coal*, petitioner's claim in this case is inextricably connected to the merits of the claim it could have brought before the Commission pursuant to the Mine Act's administrative review process. In fact, the two claims are identical. If petitioner is correct that the term "representative" under the Act cannot include union personnel, then petitioner will prevail in its administrative challenge to any citation that may issue. By contrast, jurisdiction in *Southern Ohio Coal* depended on the *lack* of connection between the mine operators' claims and the merits of any particular case. The *Southern Ohio Coal* court noted that "[h]ad the dispute been over the merits of the miners' complaints then the district court would have lacked jurisdiction in the first instance because of exclusive jurisdiction in the courts of appeals to review the Commission's decision on the merits." *Southern Ohio Coal*, 774 F.2d at 698-699 n.6.

In sum, because the jurisdictional holding in *Southern Ohio Coal* depended on the unusual nature of the mine operators' claims in that case, and because those claims were entirely different from petitioner's claims in the present case, *Southern Ohio Coal* would not have compelled a different result had this case been brought in the Sixth Circuit. Indeed, *Southern Ohio Coal* did not even address the question of jurisdiction over petitioner's principal claim—that the LMRA requires the conclusion that the term "representative" under the Mine Act cannot include union personnel at a non-union mine. There is

accordingly no conflict in the circuits requiring this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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